

1 MICHAEL B. JACKSON (SBN 053808)

2 75 Court St.

3 Quincy, CA 95971

4 Phone: (530) 283-1007

[mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)

5 Attorney for Protestants

6 California Sportfishing Protection Alliance

7 AquAlliance

California Water Impact Network

8 **BEFORE THE**

9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 HEARING IN THE MATTER OF  
11 CALIFORNIA DEPARTMENT OF WATER  
12 RESOURCES AND UNITED STATES  
13 BUREAU OF RECLAMATION  
14 REQUEST FOR A CHANGE IN POINT OF  
15 DIVERSION FOR CALIFORNIA WATER  
16 FIX

**RESPONSE TO OBJECTIONS  
REGARDING SCOPE OF TESTIMONY  
OF CSPA ET AL. (AQUALLIANCE,  
CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE AND  
CALIFORNIA WATER IMPACT  
NETWORK) FOR PART 1B**

17 **I. INTRODUCTION**

18 The proffered testimony of CSPA et al.<sup>1</sup> relates to human use of water. This petition may  
19 only be approved after hearing if the decision is in the public interest and conforms to applicable  
20 state and federal law. CSPA et al. understands the bifurcation of this hearing into Part 1 and  
21 Part 2 to be as follows: all issues relating to effects on humans should be addressed in Part 1,  
22 and all environmental and recreational issues in Part 2. We have referred to elements of D-1641  
23 in exactly the same way that the petitioners have done in their case-in-chief in Part 1A. The  
24 proponents of the petition erroneously claim mere compliance with D-1641 will protect human  
25 uses. We intend, through our proffered evidence, to prove that even if D-1641 were to stand for  
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28 <sup>1</sup> AquAlliance, California Sportfishing Protection Alliance, and California Water Impact Network.

1 an extended time, compliance of the proposed project with D-1641 would still cause future harm  
2 to legal users of water throughout California.

3 The Board must determine the point in the hearing at which evidence about harm to  
4 humans should be offered to the Board. Certainly, it is not during Part 2, since that part of the  
5 hearing is presently designed for environmental concerns primarily.

6 None of the testimony that CSPA et al. has proffered in Part 1B is outside the scope of  
7 legal injury and public interest. It is relevant to human uses of water, and therefore the Hearing  
8 Officers should not exclude it from Part 1B of this hearing.

## 9 **II. GENERAL RESPONSES TO OBJECTIONS**

10 The Department of Water Resources (DWR) and others object to any economic analysis  
11 of the California Water Fix (CWF) as being outside the scope of Part 1 of this hearing. At page  
12 11 of DWR's Master Objections to Protestants' Cases in Chief, DWR argues that financial  
13 injury is not legal injury. This objection is unfounded. The Board has a duty to make findings  
14 on the public interest as well as to protect other water rights holders from injury from the  
15 permitting of the California Water Fix.

16 DWR objects to the testimony of Ed Whitelaw and Arve Sjovold because they provide  
17 facts and other evidence that provide support for a finding by the Board of both legal injury and  
18 harm to the public interest of other legal water users throughout California. The testimony of Ed  
19 Whitelaw describes in detail what would be necessary to consider injury to legal water users,  
20 and the testimony of Arve Sjovold describes how the CWF would harm the very water users that  
21 the project would allegedly help. Both witnesses testify to evidence that is within the scope of  
22 injury to water rights holders and to harm to other water users. Both witnesses testify to  
23 evidence necessary for the consideration of the public interest. People count in this decision,  
24 and Part 2 is not the appropriate place to consider the public interest effects of the project.

25 DWR admits that the first issue noticed by the Board is whether the proposed change in  
26 the point of diversion creates a new water right. Yet it proposes to strike testimony about that  
27 issue provided by CSPA witness Chris Shutes. Part 1B is exactly the time to place facts into the  
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1 record to enable the Board to make a decision on this noticed water rights issue. In effect,  
2 DWR's objections to the relevant facts in this line of testimony ask the Hearing Officers to pre-  
3 judge the legal issue of whether DWR and the Bureau have water rights that they can legally  
4 modify.

5 Chris Shutes, Bill Jennings, and Barbara Vlamis provide testimony relevant to the  
6 inadequacy of DWR's environmental review, because the Board's January 15, 2016 ruling at  
7 page 5 says that the parties will be permitted to submit evidence and argument concerning the  
8 CEQA/NEPA documents to the extent that the evidence or argument relates to key hearing  
9 issues.

10 **III. RESPONSES TO SPECIFIC OBJECTIONS OF DWR REGARDING THE**  
11 **SCOPE OF THE TESTIMONY OF BILL JENNINGS (CSPA-2)**

12 DWR claims: *"Section IV of Mr. Jennings testimony, however, concerns the 'proper'*  
13 *standard for the "no injury" rule primarily in the context of environmental concerns, discussing*  
14 *the decline of fish species, restoration of the Delta ecosystem, and protection of public trust*  
15 *resources."*

16 Contrary to DWR's claims, Mr. Jennings' testimony on pages 3-7 addresses the noticed  
17 issues related to whether the proposed changes will cause injury to municipal, industrial and  
18 agricultural uses of water, including associated legal users of water, through both alteration of  
19 flows and water quality. Beneficial uses of water extend far beyond fisheries and recreational  
20 issues that will be addressed in Part 2. They include navigation, aesthetic enjoyment, public  
21 health and other concerns related to non-recreational water contact, subsistence fishing, etc.  
22 They apply to both direct uses of water (i.e., drinking water, irrigation, etc.) and indirect uses of  
23 water (i.e., public health, property values or taxpayer or ratepayer costs associated with  
24 increased costs to treat water or dispose of wastes associated with increased water quality  
25 degradation caused by the project).

26 Simply meeting D-1641 criteria is inadequate to assess injury because significant  
27 degradation of water quality can occur even when D-1641 criteria are met. Further, D-1641  
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1 criteria cover only a small subset of the harmful water quality constituents routinely found in  
2 Delta waters that may be exacerbated by the proposed project and cause or increase injury to  
3 users of Delta waters. For example, D-1641 does not address phosphorous. Yet increased  
4 concentration of phosphorous and decreased flow facilitates growth of aquatic weeds that  
5 hamper navigation. Nor does D-1641 address harmful algae that may threaten public health.  
6 Decreased flow and increased nutrient concentration are drivers of increased algal production.  
7 Additionally, D-1641 criteria were developed more than twenty years ago and are unlikely to be  
8 sufficient or even relevant to determining potential injury today. Mr. Jennings includes  
9 references to the proceedings conducted pursuant to the Delta Reform Act in order to illustrate  
10 the inadequacy of D-1641 for determining injury applicable to other users of water beyond  
11 aquatic life and recreation.

12 DWR claims: *“Similarly in Section VI, Mr. Jennings provides testimony concerning*  
13 *updates to the Water Quality Control Plan, the Delta Reform Act and the establishment of flow*  
14 *criteria, all of which are also irrelevant to Part 1 of the proceeding.”*

15 Contrary to DWR’s claims, Mr. Jennings’ testimony on pages 12-13 addresses the  
16 inadequacy of WaterFix modeling and the fact that it fails to comply with best available science.  
17 Water flow and quality are flip sides of the same coin: changes in flow and residence time affect  
18 pollutant concentration. Since the Delta Reform Act requires the State Board to include  
19 appropriate flow criteria in any change in point of diversion, and the State Board has already  
20 indicated that it will include interim water quality criteria pending completion of the Water  
21 Quality Control Plan update, any interim criteria must also comply with best available science.  
22 And virtually every definition of best available science includes a vigorous and transparent peer-  
23 review component.

24 DWR claims: *“In Section VIII, Mr. Jennings testifies that the public trust is pertinent to*  
25 *Part 1 of this hearing despite Water Board ruling to the contrary.”*

26 Contrary to DWR’s claims, Mr. Jennings’ testimony on pages 24-26 addresses the public  
27 interest, as it incorporates the public trust, in addressing impacts to both legal users of water and  
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1 legal uses of water, with the exception of fisheries and recreation. And it is clearly in the public  
2 interest to ensure protection of the public trust as it relates to legal users and uses of water. For  
3 example, potential impacts of the proposed project to the health of those who work in water (i.e.,  
4 repairing docks, cleaning water intakes, collecting water quality samples, etc.), the homeless  
5 who routinely drink from Delta waters and subsistence fishermen or children or pets that come  
6 into contact with toxic constituents (i.e., blue-green algae, pathogens etc.) are relevant to the  
7 public trust and public interest in Part 1. The project proponents fail to address these issues in  
8 their cases-in-chief. Further, a balancing of the public trust is in the public interest, given the  
9 length of time since the last balancing of the public trust, the uncertainty of when the public trust  
10 will be balanced in the Water Quality Control Plan update, and whether the public trust will be  
11 balanced during development of interim criteria as part of this proceeding. This response is also  
12 applicable to similar objections by San Luis & Delta-Mendota Water Authority and Tehama-  
13 Colusa Canal Authority et al.

14 DWR claims: *Finally, in Section IX, Mr. Jennings provides a list of critiques of the*  
15 *Petitioners' case-in-chief much of which involves Part 2 issues or parallel regulatory*  
16 *proceedings, which are outside the scope of Part 1.*

17 Contrary to DWR's claims, Mr. Jennings' testimony on pages 26-30 addresses the object  
18 failure of project proponents to provide sufficient information for legal users of water to  
19 determine injury or the extent of injury. The majority or all of the itemized failures are relevant  
20 and clearly applicable to Part 1 of this proceeding. Given the failure of project proponents to  
21 provide a final environmental document for the proposed project, it is entirely appropriate to  
22 refer to the State Board exhibits relating to the draft environmental documents and comments  
23 provided in response to those documents in addressing the failure of proponents to provide  
24 sufficient information to determine injury to legal users of water in Part 1. DWR witnesses  
25 discussed conclusions in the environmental documents at length in Part 1 and it would  
26 inappropriate to exclude similar comments from protestants. If the environmental documents are  
27 not relevant to Part 1, the State Board should never have accepted the petition because  
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1 petitioners case-in-chief only addresses several water quality constituents at a few locations in  
2 an estuary that comprises approximately 700 miles of meandering waterways.

3 **IV. RESPONSE TO SPECIFIC OBJECTIONS OF SAN LUIS AND DELTA-**  
4 **MENDOTA WATER AUTHORITY (SLDMWA) AND DWR REGARDING**  
5 **THE SCOPE OF TESTIMONY OF CHRIS SHUTES (CSPA-4)**

6 SLDMWA objects to the following statement in Mr. Shutes’s testimony:

7 “While the impact of risky water management on instream uses is not the subject of Part  
8 1 of the WaterFix hearings, one cannot dismiss instream uses entirely because impacts to  
9 those uses are often the mechanism through which low storage in SWP and CVP north-  
10 of-Delta reservoirs initially stress the system and ultimately cause injury to legal users of  
11 water. Sacramento River water temperatures and the management of the Shasta Reservoir  
12 to preserve its cold-water pool during 2014 and 2015 are recent obvious examples.”  
(CSPA-4, at p. 22.)

13 SLDMWA objects: “This statement is irrelevant and lacks foundation. Testimony  
14 regarding instream uses is not relevant to the current issue of the change petition’s potential  
15 effects on legal users of water.” This testimony does not address the impacts of WaterFix on  
16 public trust resources, but rather how depletion of reservoir storage affects instream resources  
17 and *in so doing becomes the mechanism that restricts* water available to legal users of water. It  
18 is entirely relevant. The operations of the SWP and CVP in 2014 and 2015 provide the  
19 foundation that SLDMWA argues is lacking.

20 DWR objects to Mr. Shutes’s use of citations from *Amador v. El Dorado* in his testimony  
21 on the grounds that it offers legal opinion. It does not. First, the cited quotation on pages 6-7 of  
22 Mr. Shutes’s testimony is a concise description of how a project proponent should describe and  
23 present hydrological modeling in order to inform decision making. Second, the quotation  
24 establishes that proponents did not provide needed information in their CEQA document, and  
25 thus establishes a burden to provide that information in the present hearing. As Mr. Shutes’s  
26 testimony states on p. 7, “*Amador v. El Dorado* describes substantive as well as legal  
27 deficiencies that hinder reasoned analysis.” Mr. Shutes’s recounting of the inadequacies of the  
28 proponents’ purported description of reservoir operations is, moreover, based on Mr. Shutes’s

1 personal involvement with the underlying controversy that *Amador v. El Dorado* addressed.  
2 Mr. Shutes developed part of the numeric and narrative solution to this controversy,  
3 notwithstanding DWR’s argument that he “lacks the necessary expertise to provide testimony in  
4 the modeling of reservoir operations.”

5 **V. RESPONSE TO SPECIFIC OBJECTIONS OF DWR TO TESTIMONY OF DR.**  
6 **G. FRED LEE**

7 DWR objects to portions of Dr. Lee’s testimony regarding water quality on the grounds  
8 that Dr. Lee describes water quality impacts of the proposed project to aquatic resources and  
9 recreation, and does not limit his testimony to human uses of water in other than recreation.  
10 DWR states that because Dr. Lee’s testimony addresses water quality issues relevant to both  
11 Part 1 and Part 2 of this hearing, some sections of Dr. Lee’s testimony in Part 1B should be  
12 stricken because they address issues that should be addressed in Part 2.

13 Changes in water quality are difficult to categorize and often are not neatly  
14 distinguishable between impacts to fisheries and recreation on the one hand and impacts to other  
15 human uses of water on the other hand. For example, increases in algae or aquatic vegetation  
16 can impact the safety of swimming or otherwise entering the water. Entering the water is not  
17 only a recreational issue, but also can affect the maintenance of boats, as well as docks and other  
18 infrastructure. Increases in algae or aquatic vegetation can have additional impacts, such as  
19 clogging of intakes, reduction of access to intakes and pumps, etc. Even fish kills, cited by  
20 DWR, can have impacts to legal users of water, reducing quality of quality of life for owners of  
21 riparian property, including riparian water rights holders.

22 Since the distinction proposed by DWR is difficult to define, CSPA recommends that the  
23 testimony of Dr. Lee be left intact, and that the Board consider its relative weight as appropriate.

24 **VI. RESPONSE TO THE OBJECTIONS OF DWR AND SLDMWA REGARDING**  
25 **THE SCOPE OF TESTIMONY OF TOM CANNON**

26 Mr. Cannon presents expert testimony regarding the likely durability of the Biological  
27 Opinions for the operation of the State Water Project and the Central Valley Project, and  
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1 regarding the likely durability of the requirements of D-1641. Mr. Cannon bases this testimony  
2 on forty years of professional experience working in the Bay-Delta estuary. Mr. Cannon's  
3 concludes that neither the Biological Opinions nor D-1641 are likely to stand because he has  
4 witnessed first-hand their failure to protect the public trust resources of the Bay-Delta estuary.  
5 Mr. Cannon's testimony is relevant to Part 1B of the hearing because proponents DWR and the  
6 Bureau of Reclamation have based their argument on the absence of injury to legal users of  
7 water on likely future compliance with the Biological Opinions and D-1641. Mr. Cannon's  
8 testimony provides a factual basis for the conflicting argument that the lack of durability of the  
9 regulatory constraints of the Biological Opinions and D-1641 renders DWR and the Bureau's  
10 standard for injury invalid.

11 **VII. CONCLUSION**

12 For the reasons stated above, the Hearing Officers should not grant the objections to the  
13 scope of the testimony of CSPA et al. and should not exclude testimony as requested in those  
14 objections.

15 Dated: September 30, 2016

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18  
19 For Michael B. Jackson  
20 Attorney for Protestants CSPA et al.  
21 (California Sportfishing Protection Alliance,  
22 AquAlliance and California Water Impact  
23 Network)  
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**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING**  
**Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

RESPONSE TO OBJECTIONS REGARDING SCOPE OF TESTIMONY OF CSPA ET AL. (AQUALLIANCE, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE AND CALIFORNIA WATER IMPACT NETWORK) FOR PART 1B

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 20 September 2016, posted by the State Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

I certify that the foregoing is true and correct and that this document was executed on 30 September 2016.



Signature: \_\_\_\_\_  
Name: Bill Jennings  
Title: Executive Director  
California Sportfishing Protection Alliance

Party/Affiliation:  
CSPA et al. (California Sportfishing Protection Alliance  
AquAlliance, California Water Impact Network)

Address:  
3536 Rainier Avenue  
Stockton, CA 95204